

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of George Scharch for a)	
Permit to Construct a Pier on the)	Case No. 3-SD-93-2125
Bed of Green Lake, City of Green Lake,)	
Green Lake County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on August 8-10, 1995 at Green Lake, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge.

The hearing was part of a consolidated hearing involving three separate applications in the Dartford Bay section of Green Lake. The parties submitted written briefs and the last submittal was received on September 11, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

George and Marilyn Scharch, by

Carl Sinderbrand, Attorney
2 East Gilman Street, Suite 300
Madison, Wisconsin 53701-1683

Wyndham F. Gary
W3188 County K
Green Lake Township, WI 53946

FINDINGS OF FACT

1. George and Marilyn Scharch (the applicants), 407 Strauss Avenue, Green Lake, Wisconsin 54941, completed filing an application with the Department for a permit

under sec. 30.12, Stats., to expand an existing single pier from 11 to 17 slips on the bed of Green Lake, City of Green Lake, Green Lake County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in Government Lot 2, S 1/2, SW 1/4 in Section 21, Township 16 North, Range 13 East, Green Lake County. The above-described property abuts Big Green lake which is navigable in fact at the project site. The applicants own approximately 95.5 feet of riparian frontage at the site.

3. The applicants own an existing multi-slip pier approximately 100 feet long and 50 feet wide. The pier currently accommodates at least 11 boats. The applicants propose to extend the northern lateral wing of the existing pier by 24 feet, for a maximum width of 74 feet. The pier length would be extended to a maximum of 132 feet. The proposed pier would accomodate a total of 17 boats. Mr. Scharch estimated the water depth to be less than four feet at the end of the proposed pier. The proposed pier is not a solid pier and does not interrupt the free flow of water or cause the formation of land by the deposition of littoral drift.

4. The purpose of the pier slip expansion is to provide for additional boat slip rentals to respond to increased demand for such slips on Big Green Lake. Until recent years the site supported only a small, muti-slip family pier. The applicants increased the number of slips at the site to its present size in 1988. The applicants rent out pier slips on a seasonal basis from their private residence. No parking, restroom or marina clubhouse facilities are specifically provided by the Scharch family. (Miller)

5. The proposed structures will not materially obstruct existing navigation on Big Green Lake. The project area is not within the usual pattern of navigation on Big Green Lake, due to shallow water depths at the site. The area of Dartford Bay near the proposed site is not near the primary boater attractions in the Bay proper (e.g., Mill Pond, marina, the City of Green Lake and parks). The predominant pattern of navigation in Dartford Bay is to the designated navigation channel nearly 1000 feet from the project site, and from there out of the Bay into the open waters of Big Green Lake. Boats at the end of the pier would egress directly westward to the channel.

6. The proposed project is detrimental to the public interest in navigable waters because the proposed pier expansion exceeds the reasonable use of riparian property by an individual. Wisconsin law recognizes the right of a riparian to make reasonable use of navigable waters, including the conditional right to place piers or other structures on the bed of navigable waters to allow a riparian to gain access to said waters. What constitutes reasonable use, under the common law test, is a factual determination, varying from case to case and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. State ex. rel.

Chain of Lakes v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). Factors to be taken into account include "...the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so also to the size of the stream, the fall of water, its volume, velocity and prospective rise and fall." Id., citing Timm v. Bear, 29 Wis. 254, 265 (1871). The decisive factor in this application is the extent of the applicants' use of the near-shore area in relation to the small amount of frontage that they own. Eleven boat slips for less than 100 feet of lake frontage already seems excessive for a single individual riparian. The proposed addition of six more slips, covering an ever larger area of public waters, is clearly an unreasonable use for a site which has not historically been a public marina site. The waters of Big Green Lake belong to the public. The applicants have a qualified right to place piers to gain access to these public waters. Their existing piers are at the very limits of what could be considered "reasonable use" of public waters by an individual riparian. The proposed expansion would take them well beyond the common law notion of reasonable use. The ALJ does not rely upon the DNR Guidance Document (Ex.19, A), which has not been promulgated as an administrative rule. It is worth noting, however, that under the Department Guidance the applicants would be eligible to moor three boats given their 95.5 feet of riparian frontage.

7. The project in and of itself would not be detrimental to the public interest in natural scenic beauty. The area in and around the proposed project site has few remaining natural features. The lot has mature trees and a well-kept grass lawn. The existing Scharch piers area have already jammed the near shore area with boats to the detriment of any natural scenic beauty. The addition of six more slips in and of themselves would not significantly have an impact on natural scenic beauty at the site.

8. DNR Area Water Resource Manager Mark Sasing testified that there was a mixed and abundant stand of aquatic plants in the public waters in the Scharch pier zone. Said plants include water stargrass, curly leaf pondweed, coontail, Elodea, buttercup, flatstem pondweed, and wild celery. (Ex. 107). There is also a remnant stand of bulrush located on the property line between Scharch property and the piers to the south. White water lilly are also common in the area (Id. and Ex. 63) This diverse and abundant stand of aquatic plants includes emergent, submergent and floating leaf species. (Sasing) Sasing provided convincing expert testimony that the proposed pier expansion would have localized detrimental impacts to this plant community and to the functional values it serves in providing habitat to various fish species, as well as tending to stabilize sediments in the area. Sasing also opined that plant growth in the area of the Scharch pier had been suppressed by boat traffic in the area. A clear preponderance of the credible evidence indicates that the applicants have not carried their burden of showing that the proposed pier expansion would be "not detrimental to the public interest" in maintaining aquatic vegetation in the public navigable waters at the site.

9. As noted, the rich aquatic plant life in the proposed project area provides cover and habitat to fish species including large mouth bass and bluegill. DNR Fisheries Biologist David Bartz opined that the shallow eastern near-shore area of Dartford Bay including the proposed pier expansion was a spawning area for large mouth bass. Bartz testified that the healthy aquatic plant community was particularly important to juvenile large mouth bass to protect them from predators. Bartz testified that increased boat traffic associated with the pier expansion would detrimentally impact fish spawning because bottom sediments would be disturbed and likely to cover eggs and fry with sediments, decreasing their chance of survival. Bartz further opined that, by consuming a larger area of public waters, the proposed pier expansion would further reduce suitable spawning areas available to largemouth bass. The applicants have not carried their burden of proof in showing that the proposed pier expansion would be not detrimental to the public interest in maintaining fish spawning areas and maintaining a recreational fishery in the public navigable waters at the site.

10. Numerous DNR citizen witnesses testified persuasively that to allow an individual riparian such as Mr. Scharch to cram in as many pier slips as possible in the near-shore water area would result in a proliferation of similar projects that would have a significant detrimental impact on the public's right to use and enjoy public waters, as well as on lakeshore aesthetics and other public rights in navigable waters. If every riparian with 95 feet of frontage moored 17 boats, the natural landscape of our public waters would be permanently disfigured. The proposed pier expansion is detrimental to the public interest in navigable waters because approval of this project would be likely to result in significant detrimental cumulative impacts.

11. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

12. The proposed pier expansion would not have a detrimental impact upon the public interest in maintaining wildlife habitat. The shoreline area offers little vegetative cover to terrestrial wildlife, although migratory waterfowl do make use of the area. (Ex.70). Muskrats make use of the near-shore area. (Ex.63). Taken as a whole, a preponderance of the credible evidence would not support denial of the proposed expansion on the basis of impacts to terrestrial wildlife habitat.

13. The proposed structures would not reduce the effective flood flow capacity of Big Green Lake.

14. The proposed structure will not adversely affect water quality nor will it increase water pollution in the Big Green Lake. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats. Pier expansion and the resulting increase of

boat traffic in the area are unlikely to have an impact on the water quality of the lake as a whole. (Ex. 6).

15. The Department of Natural Resources has made an environmental assessment of the proposed project and determined that the grant or denial of the permit requested does not constitute a major state action significantly affecting the quality of the human environment.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to deny a permit which is detrimental to the public interest in navigable waters.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

3. The proposed pier expansion described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

4. The proposed project would be "detrimental to the public interest" in navigable waters within the meaning of sec. 30.12(2), Stats.

5. The DNR and the Division must consider the cumulative impacts of permitting structures under Chapter 30, Stats. Hixon v. Public Service Commission, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966). There would be a cumulative detrimental impact to the public waters of this state if similar large structures were regularly placed upon public waters by individuals owning minimal riparian frontage.

6. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The Department conducted an Environmental Assessment (EA) which complies with the procedural requirements of sec. 1.11, Stats.

7. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats. on the ground that they impair natural beauty. This is a proper basis for denial of a permit. Claflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty.

8. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v.

DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would be not detrimental to the public interest in navigable waters.

9. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resources. State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

Factors to be taken into account include: ". . . the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall" Timm v. Bear, (1871), 29 Wis. 254, 265.

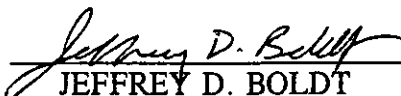
The proposed project exceeds the rights of a riparian to the "reasonable use" of public waters when balanced against the public interest in maintaining Green Lake for "usage and conservation as a state resource." State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the application of George and Marilyn Scharch be DENIED, for the reasons set forth above.

Dated at Madison, Wisconsin on October 24, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.